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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CHRISTIAN ABRAHAM SOTO, Defendant and Appellant.	F078925 (Super. Ct. No. VCF240382B) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden, Judge.

Jean M. Marinovich, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Clara M. Levers, Deputy Attorneys General, for Plaintiff and Appellant.

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[*]Before Levy, Acting P.J., Peña, J. and DeSantos, J.

INTRODUCTION

Nine years ago, defendant Christian Abraham Soto pled guilty to attempted murder under an aiding and abetting theory in lieu of trial. After the passage of Senate Bill No. 1437 (2017–2018 Reg. Sess.) (Senate Bill 1437), defendant petitioned for relief in the trial court under Penal Code section 1170.95, but the court denied his petition for failure to state a prima facie case since defendant entered a plea to attempted murder as opposed to murder. On appeal, defendant contends the trial court erred in denying his petition because due process and equal protection require extension of the petitioning procedure provided for in section 1170.95 to defendants, like him, who were convicted of attempted murder under the natural and probable consequences doctrine.

We affirm the judgment.

FACTUAL BACKGROUND

In January 2011, defendant pled no contest to nonpremeditated attempted murder (Pen. Code, §§ 187, 664) and disturbing the peace (§ 415, subd. (1)), with a firearm enhancement (§ 12022.53, subd. (c)) and a criminal gang enhancement (§ 186.22, subd. (b)).[1] Pursuant to the plea agreement, as to the attempted murder conviction, defendant was sentenced to state prison for five years with an additional consecutive 20 years for the firearm enhancement, for a total of 25 years. He was also sentenced to an additional two years for the section 415 charge, which was ordered to run concurrently, and the criminal gang enhancement was stayed. At the sentencing hearing, the parties stipulated defendant was "being convicted on an aiding and abetting theory, he's not the shooter."

Eight years later, in February 2019, defendant petitioned for resentencing pursuant to Senate Bill 1437. In his petition, defendant argued his attempted murder conviction must be stricken in light of the abrogation of the natural and probable consequences

[1]The specific facts of the underlying offenses are not relevant to our disposition; thus, we do not address them.

doctrine. The trial court denied defendant's request for resentencing, noting he entered a plea to attempted murder on January 28, 2011, and could not establish eligibility for resentencing. Defendant now appeals the denial of his petition for resentencing.

DISCUSSION

Defendant argues the petitioning procedure enacted by Senate Bill 1437 should be extended to defendants, like him, who accepted a plea offer in lieu of a trial at which they could have been convicted of attempted murder under a natural and probable consequences theory.

I. Senate Bill 1437

On September 30, 2018, the Governor signed Senate Bill 1437, which became effective on January 1, 2019. Senate Bill 1437 "amend[ed] the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) This was accomplished through amendments to Penal Code sections 188 and 189. (Stats. 2018, ch. 1015, §§ 2–3.)

The legislation also added Penal Code section 1170.95, which provides a procedure by which those convicted of murder can seek retroactive relief if the changes in the law would affect their previously sustained convictions. (Stats. 2018, ch. 1015, § 4.) Specifically, section 1170.95 permits those "convicted of felony murder or murder under a natural and probable consequences theory [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts …." (*Id.*, subd. (a).) An offender may file a petition under section 1170.95 where all three of the following conditions are met:

> "(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony

murder or murder under the natural and probable consequences doctrine[;] [¶]

"(2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder[; and] [¶]

"(3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (Pen. Code, § 1170.95, subd. (a)(1)–(3).)

A trial court receiving a petition under Penal Code section 1170.95 "shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section." (§ 1170.95, subd. (c).) If the petitioner has made such a showing, the trial court "shall issue an order to show cause." (*Ibid.*) The trial court must then hold a hearing "to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not been previously been [*sic*] sentenced, provided that the new sentence, if any, is not greater than the initial sentence." (§ 1170.95, subd. (d)(1).)

II. Applicable Law

The federal equal protection clause (U.S. Const., 14th Amend.) and the California equal protection clause (Cal. Const., art. I, § 7, subd. (a)) provide that all persons similarly situated should be treated alike. The first inquiry in an equal protection analysis is whether the state adopted a classification that affects two or more similarly situated groups in an unequal manner; it "is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.'" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253; accord, *People v. Valencia* (2017) 3 Cal.5th 347, 376.) "Where two or more groups are properly distinguishable for purposes of the challenged law, it is immaterial if they are indistinguishable in other respects." (*People v. Barrett* (2012) 54 Cal.4th 1081, 1107.)

It is not enough that individuals are similarly situated if there is a rational basis for an alleged sentencing disparity. (See *People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) The California Supreme Court has rejected the general proposition that "all criminal classifications are subject to strict judicial scrutiny. (*Ibid.*) Rather, a defendant "'does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives.'" (*Ibid*.)

"[B]oth the United States Supreme Court and [the California Supreme Court] have recognized the propriety of a legislature's taking reform '"one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."'" (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 488.) "Nothing compels the state 'to choose between attacking every aspect of a problem or not attacking the problem at all.' [Citation.] Far from having to 'solve all related ills at once' [citation], the Legislature has 'broad discretion' to proceed in an incremental and uneven manner without necessarily engaging in arbitrary and unlawful discrimination." (*People v. Barrett*, *supra*, 54 Cal.4th at p. 1110.)

III. Analysis

Defendant concedes the plain language of Penal Code section 1170.95 does not provide him with an avenue for relief because he was convicted of attempted murder. However, he argues due process and equal protection principles require extension of the remedial procedure provided for in section 1170.95 to defendants convicted of attempted murder under the natural and probable consequences doctrine. We disagree.

We recently held Senate Bill 1437's changes to Penal Code sections 188 and 189 preclude imposition of vicarious liability under the natural and probable consequences doctrine if the charged offense requires malice aforethought. (See *People v. Larios* (2019) 42 Cal.App.5th 956, 966, rev. granted Feb. 26, 2020, S259983; *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1013.) Accordingly, because under the amended

statutes malice cannot be imputed to a defendant who aids and abets a target offense without the intent to kill, the natural and probable consequences doctrine is no longer a viable theory of accomplice liability for attempted murder. (*People v. Larios*, *supra*, at p. 966; *People v. Medrano*, *supra*, at p. 1013.) Put differently, since "implied malice cannot support a conviction of an *attempt* to commit murder" (*People v. Bland* (2002) 28 Cal.4th 313, 327), the current version of section 188 requires proof the aider and abettor acted with the intent to kill while aiding and abetting the target offense. (*People v. Larios*, *supra*, at p. 966; *People v. Medrano*, *supra*, at p. 1013.)

However, we also noted the plain language of Penal Code section 1170.95, subdivision (a) limits relief to persons "convicted of felony murder or murder under a natural and probable consequences theory [to] file a petition with the court …." (*People v. Larios*, *supra*, 42 Cal.App.5th at p. 969, rev. granted; *People v. Medrano*, *supra*, 42 Cal.App.5th at p. 1017.) No language in section 1170.95 references relief to persons convicted of attempted murder, and the legislative history of Senate Bill 1437 supports the conclusion section 1170.95 was intended to apply only to persons convicted of murder. (*People v. Larios*, *supra*, at p. 969; *People v. Medrano*, *supra*, at p. 1017.)

And, contrary to defendant's argument, we cannot conclude Penal Code section 1170.95's limited avenue for relief to those convicted of felony murder or murder under a natural and probable consequences theory violates equal protection principles. Even if defendants convicted of attempted murder under a natural and probable consequences theory could establish they are "similarly situated" to those convicted of murder under a natural and probable consequences theory for purposes of Senate Bill 1437, as our sister courts held in *People v. Lopez* (2019) 38 Cal.App.5th 1087, review granted November 13, 2019, S258175, and *People v. Munoz* (2019) 39 Cal.App.5th 738, review granted November 26, 2019, S258234, there is a rational basis for the Legislature's decision to grant relief pursuant to section 1170.95 only to murder convictions based on

judicial economy and the financial costs associated with reopening both final murder and final attempted murder convictions:

> "There may well be sound policy reasons for the Legislature to adopt ameliorative provisions like those in Senate Bill 1437 for individuals charged with, or convicted of, attempted murder under the natural and probable consequences doctrine. But the Legislature's decision to limit sentencing reform at this time to offenders in cases of murder is certainly rational. First, the gap between a defendant's culpability in aiding and abetting the target offense and the culpability ordinarily required to convict on the nontarget offense is greater in cases where the nontarget offense is murder, than where the nontarget offense is attempted murder or, in the prosecutor's discretion, aggravated assault. The Legislature could have reasonably concluded reform in murder cases 'was more crucial or imperative.' …
>
> "Second, the process created in section 1170.95 for those convicted of felony murder or murder under a natural and probable consequences theory to petition the sentencing court to vacate that conviction and to be resentenced is not cost free. The staff of the Senate Appropriations Committee estimated, if 10 percent of the inmates eligible for relief under Senate Bill 1437 petitioned the courts for resentencing, additional court workload costs would approximate $7.6 million. The committee's report expressed concern that this increase in workload 'could result in delayed court services and would put pressure on the General Fund to fund additional staff and resources.' (Sen. Com. Appropriations Report, p. 3.) Additional expenditures would also be required to transport petitioners in custody to and from court hearings. (*Ibid.*)
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> "In a world of limited resources, it is reasonable for the Legislature to limit the scope of reform measures to maintain the state's financial integrity. [Citations.]" (*People v. Lopez*, *supra*, 38 Cal.App.5th at pp. 1111–1112, fn. omitted, rev. granted; see *People v. Munoz*, *supra*, 39 Cal.App.5th at pp. 763–767, rev. granted.)

Thus, in light of Penal Code section 1170.95's unambiguous language, defendant is categorically excluded from seeking relief through its petitioning procedure for his attempted murder conviction, which has long been final. Because there is a rational basis to exclude defendants convicted of attempted murder from the ambit of section 1170.95, we find no equal protection violation.

We also cannot conclude defendant has established a due process violation. In his opening brief on appeal, defendant generally cites to article I, section 7 of the California Constitution and to the Fifth and Fourteenth Amendments to the United States Constitution in support of his assertion excluding those convicted of attempted murder from the benefits of Penal Code section 1170.95 violates due process. However, defendant does not specify any clause within those authorities and, more importantly, provides no meaningful analysis as to how those authorities apply to his claim. Thus, defendant has not met his burden to establish a due process violation.

We reject defendant's sole contention.

DISPOSITION

We affirm the judgment.